

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SUZANNE NAVONE,

Plaintiff,

v.

ACTION WATERSPORTS OF TAHOE,
et al.,

Defendants.

No. 2:20-cv-01351-JAM-JDP

**ORDER GRANTING DEFENDANT ACTION
MOTORSPORTS OF TAHOE, INC.'S
(ERRONEOUSLY SUED AS ACTION
WATERSPORTS OF TAHOE) MOTION TO
DISMISS PLAINTIFF'S COMPLAINT**

This matter is before the Court on Defendant Action Motorsports of Tahoe, Inc.'s ("Defendant AMT") motion to dismiss Plaintiff Suzanne Navone's ("Plaintiff") complaint under Rules 12(b) (5) and 12(b) (6) of the Federal Rules of Civil Procedure ("Rules"). Def.'s Mot. to Dismiss ("Mot."), ECF No. 14.

For the reasons set forth below, the Court GRANTS Defendant AMT's motion.¹

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¹This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

1 I. ALLEGATIONS AND BACKGROUND

2 This action arises from an incident on July 4, 2017, when
3 Plaintiff was allegedly struck by a water taxi while she was
4 swimming in Lake Tahoe, California (the "Incident"). Compl.
5 ¶ 13. The defendants named in the complaint allegedly owned or
6 operated the water taxi that struck Plaintiff. Compl. ¶¶ 6-10,
7 13.

8 To date, Defendant AMT has not been served. See generally
9 Dkt.; Def.'s Suppl. Brief, ECF No. 23 at 3. Although Plaintiff
10 claims she served Defendant AMT, she instead served an entity
11 named "Action Watersports of Incline Village, LLC" at an address
12 unconnected to Defendant AMT. ECF No. 17 at 2; Def.'s Suppl.
13 Brief at 3. The only Defendant that has been served in this
14 action is Camp Richardson Resort, Inc., but it was recently
15 dismissed by stipulation and order. ECF No. 13.

16 Defendant AMT now moves to dismiss the complaint. Mot.
17 Plaintiff filed an opposition, Opp'n, ECF No. 19, and Defendant
18 AMT replied, Reply, ECF No. 21.

19 After reviewing the parties' briefs, the Court issued a
20 Minute Order requesting each party submit supplemental briefing
21 regarding Rule 4(m). Minute Order, ECF No. 22. The Court also
22 requested Defendant AMT respond to three issues, including its
23 relationship, if any, to Action Watersports of Tahoe. Id. The
24 parties filed supplemental briefs in response to the Court's
25 Minute Order. Def.'s Suppl. Brief, ECF No. 23; Pl.'s Suppl.
26 Brief, ECF No. 24. The Court will consider Plaintiff's
27 supplemental brief even though it was untimely filed.

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1 Before Defendant AMT filed the instant motion to dismiss
2 (ECF No. 14), the Court issued an Order to Show Cause ("OSC") as
3 to why this action should not be dismissed for failure to
4 prosecute given three years of inactivity. OSC, ECF No. 6. To
5 date, the Court has not discharged its OSC. While this motion
6 and the OSC relate to the prolonged period of inactivity in this
7 action, they concern different legal issues and will be resolved
8 separately. Accordingly, this Order is independent from the
9 Court's Order that will be issued in connection with the
10 outstanding OSC.

11 Because the Incident occurred in navigable waters involving
12 traditional maritime activity, the action is governed by federal
13 maritime law pursuant to 28 U.S.C. section 1333. Compl. ¶ 1.
14 The parties do not dispute the Court's maritime jurisdiction.

II. OPINION

A. Legal Standard

17 A defendant may move to dismiss a complaint for
18 insufficient service of process under Rule 12(b)(5) of the
19 Federal Rules of Civil Procedure. The parameters of sufficient
20 service of process are outlined in Rule 4. Under Rule 4(m), the
21 plaintiff must serve a defendant "within 90 days after the
22 complaint is filed." If the plaintiff fails to serve a
23 defendant within this period, the Court "must dismiss the action
24 without prejudice against that defendant or order that service
25 be made within a specified time." Fed. R. Civ. P. 4(m). "But
26 if the plaintiff shows good cause for the failure, the court
27 must extend the time for service for an appropriate period."

28 || Id.

1 Dismissal is appropriate under Rule 12(b)(6) of the Federal
2 Rules of Civil Procedure when a plaintiff's allegations fail "to
3 state a claim upon which relief can be granted." Fed. R. Civ.
4 P. 12(b)(6). "To survive a motion to dismiss [under 12(b)(6)],
5 a complaint must contain sufficient factual matter, accepted as
6 true, to state a claim for relief that is plausible on its
7 face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal
8 quotation marks and citation omitted).

9 B. Analysis

10 Defendant AMT moves to dismiss Plaintiff's complaint under
11 Rule 12(b)(5) on the ground that service of process is
12 insufficient because the complaint was not served within 90 days
13 of filing pursuant to Rule 4(m). Mot. at 8-10. The parties do
14 not dispute that Defendant AMT was not served within 90 days.
15 See generally Mot.; Opp'n; see also Dkt. Instead, Plaintiff
16 argues it has good cause for the delay. Opp'n at 10.
17 Alternatively, in the absence of good cause, Plaintiff requests
18 the Court exercise its discretion and extend the time in which
19 it can effectuate service. Plf.'s Suppl. Brief at 3-5.

20 Defendant AMT also moves to dismiss the complaint under
21 Rule 12(b)(6) for failure to state a claim upon which relief can
22 be granted. Mot. at 7-8. Because the insufficient service of
23 process argument is dispositive, the Court need not consider
24 Defendant AMT's 12(b)(6) argument at this time.

25 1. Service of Process Under Rule 4(m)

26 Rule 4(m) requires a two-step analysis in deciding
27 whether or not to extend the prescribed time period
28 for the service of a complaint. [] First, upon a
showing of good cause for the defective service, the
court must extend the time period. Second, if there

1 is no good cause, the court has the discretion to
2 dismiss without prejudice or to extend the time
3 period.

4 In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001) (internal
5 citations and quotations omitted). The burden of establishing
6 good cause is on the plaintiff. Boudette v. Barnette, 923 F.2d
7 754, 755 (9th Cir. 1991). "At a minimum, 'good cause' means
8 excusable neglect." Id. at 756. "An attorney's ignorance of the
9 rules, oversight, inadvertence, or mistake does not rise to the
10 level of excusable neglect—much less good cause." James v. Cnty.
11 of Sacramento, No. 2:18-CV-00180-TLN-DB, 2022 WL 2533484, at *4
12 (E.D. Cal. July 7, 2022) (citing Wei v. State of Hawaii, 763 F.2d
13 370, 372 (9th Cir. 1985)).

14 In the absence of good cause, courts have discretion to
15 dismiss the action or extend the period to complete service. In
16 re Sheehan, 253 F.3d 507, 513 (9th Cir. 2001); Fed. R. Civ. P.
17 4(m). The Ninth Circuit has declined to articulate a specific
18 test that district courts must apply when exercising their
19 discretion. In re Sheehan, 253 F.3d at 513. Nevertheless,
20 courts frequently consider the following factors when conducting
21 the "two-step" analysis of Rule 4(m): (1) the length and reason
22 of the delay; (2) whether the delay prejudiced the defendant; and
23 (3) whether dismissal of the action would prejudice the
24 plaintiff. See Efaw v. Williams, 473 F.3d 1038, 1041
25 (9th Cir. 2007) (quoting Troxell v. Fedders of N. Am., Inc.,
26 160 F.3d 381, 383 (7th Cir. 1998)); In re Sheehan, 253 F.3d
27 at 513; Boudette, 923 F.2d at 756 (citing Hart v. United States,
28 817 F.2d 78, 80-81 (9th Cir. 1987); see also James, 2022 WL
2533484 at *4-5.

1 a. Length and Reason of Delay

2 Over three and a half years have passed since Plaintiff
3 filed the complaint, and Defendant AMT has still not been
4 served. Supra at 2. In Efaw, 473 F.3d 1038, the Ninth Circuit
5 found a seven-year delay "extraordinary," warranting dismissal
6 under Rule 4. Id. at 1041. Although the three-and-a-half-year
7 delay here is less than that in Efaw, it is still extraordinary
8 and sharply weighs in favor of dismissal and against a finding
9 of good cause.

10 The reason for the delay also supports dismissal and the
11 lack of good cause. Plaintiff's justification for the delay is
12 that she was given a business card on the day of the Incident
13 indicating "Action Watersports of Tahoe" was the allegedly
14 responsible party, but she was unable to locate an entity with a
15 matching name. Opp'n at 8-9; Birnberg Decl. at ¶ 7. Because
16 Plaintiff could not find an exact match, she attempted to serve
17 an entity with a similar name, focusing on the word
18 "Watersports." See Opp'n at 2-3, 9; Birnberg Decl. at ¶ 7;
19 Return of Service, ECF No. 17 at 2; Plf.'s OSC Response, ECF No.
20 7 at 3-6 (i.e., "Action Watersports of Tahoe Vista, LLC" and
21 "Action Watersports of Incline Village, LLC"). Because these
22 similarly named entities appeared inactive, Plaintiff
23 inexplicably assumed the responsible defendant must also be
24 inactive. Plf.'s OSC Response at 5.

25 Plaintiff's reliance on the status and addresses of
26 similarly named—but clearly different—entities is unreasonable.
27 Plaintiff failed to consider that Action Watersports of Tahoe
28 was Defendant AMT's registered fictitious business name with El

1 Dorado County. Rather than exhaust all avenues to locate the
2 proper party, such as by searching other databases and records,
3 several of which Defendant AMT provides in its supplemental
4 brief, see ECF No. 23, Plaintiff took no further action until
5 the Court ordered her to show cause for failure to prosecute.
6 Plf.'s OSC Response at 3-6. Plaintiff also attributes the delay
7 in service to the departure of the attorney handling Plaintiff's
8 case and a lapse in attorney-client communications. Plf.'s OSC
9 Response at 2.

10 These reasons amount to oversight rather than excusable
11 neglect and do not justify the extensive delay here. Notably,
12 this is not a situation in which Plaintiff found an inactive,
13 California entity with the exact name as that printed on the
14 business card Plaintiff received. The differences in the
15 entities' names should have made it apparent that Plaintiff had
16 not yet found the correct party.

17 In sum, Plaintiff could have pursued more diligent
18 alternatives to locate and serve Defendant AMT rather than stay
19 idle for several years. The length and reason for delay
20 strongly weigh against a finding of good cause and support
21 dismissal.

22 b. Prejudice to Defendant

23 Defendant AMT argues it has been prejudiced from the delay
24 in service because control of Defendant AMT has since changed,
25 Defendant AMT no longer employs the individuals who may have
26 captained the water taxi, the locations of those individuals are
27 unknown, and these changes and uncertainties will impact legal
28 strategy. Def.'s Suppl. Brief at 6-7. Defendant AMT submits

1 the declaration of Robert Hassett, the former President of
2 Defendant AMT at the time of the Incident until early-2022, in
3 support of its argument. Declaration of Robert Hassett
4 ("Hassett Decl."), ECF No. 23-1. While Mr. Hassett declares
5 some discovery may not have been retained, was destroyed, or is
6 now inaccessible to him, Hasset Decl. at ¶ 14, the
7 persuasiveness of this declaration is limited because it is
8 speculative, is submitted by a non-party witness, and despite
9 the delay and change of control, the discovery may still be
10 obtainable through third-party discovery procedures. Even so,
11 the Court acknowledges that the delay has likely created
12 difficulty with conducting discovery that may prejudice
13 Defendant AMT. Further, the significant passage of time
14 prejudices Defendant AMT because it affects the availability and
15 reliability of witnesses. Efaw, 473 F.3d at 1041. The
16 prejudice is exacerbated considering the Incident occurred
17 almost seven years ago.

18 Courts also consider whether the defendant had actual
19 notice of the lawsuit within the 90-day service period. Efaw,
20 473 F.3d at 1041. Plaintiff entirely relies upon letters mailed
21 one year before the lawsuit was filed to establish Defendant AMT
22 had actual notice of the lawsuit. Exh. G to Opp'n, ECF No. 19-1
23 at 29, 32. Notably, these letters do not express an intention
24 to commence litigation in the future. Id. Even though
25 Plaintiff sent the letters "to all the addresses [she] could
26 find," Birnberg Decl. at ¶ 7, this does not support that
27 Defendant AMT had actual notice. Further, Mr. Hassatt declares
28 that while he was President of Defendant AMT, he did not have

1 actual notice of the lawsuit during the 90-day period. Hasset
2 Decl. at ¶ 10 (declaring he was unaware of this lawsuit until
3 September of 2023).

4 Additionally, there is no evidence Defendant AMT attempted
5 to evade service or contributed to Plaintiff's delay by wrongful
6 conduct. See Efav, 473 F.3d at 1041. Although Defendant AMT
7 did not respond to Plaintiff's correspondences, Plf.'s OSC
8 Response at 3, assuming Defendant AMT indeed received those
9 letters, it was under no legal obligation to respond. Further,
10 Defendant AMT's use of a fictitious business name was not wrongful
11 or made in bad faith to prevent Plaintiff from timely
12 effectuating service.

13 In sum, Plaintiff has not shown Defendant AMT would not be
14 prejudiced by the three-and-a-half-year delay.

15 c. Prejudice to Plaintiff

16 Both parties explicitly and implicitly concede Plaintiff
17 may be severely prejudiced if the complaint is dismissed without
18 prejudice because a newly-filed complaint may be time-barred.
19 Plf.'s Suppl. Brief at 4; Def.'s Suppl. Brief at 7-8. The Court
20 acknowledges the severe effect dismissal may have on Plaintiff.
21 Accordingly, this factor weighs against dismissal. However,
22 this neither mandates a finding of good cause nor obligates the
23 Court to extend the period to effectuate service. See Hart v.
24 United States, 817 F.2d 78, 81 (9th Cir. 1987).

25 d. Totality of Factors and Conclusion

26 Given the totality of the factors above, the Court finds
27 Plaintiff has not demonstrated good cause for the failure to
28 comply with Rule 4(m). The justifications for the delay are

1 unreasonable and do not rise to the level of excusable neglect;
2 Plaintiff has not shown the failure to serve Defendant AMT
3 within the prescribed timeframe resulted from something other
4 than ignorance, oversight, inadvertence, or mistake—all of which
5 are insufficient. James, 2022 WL 2533484, at *4 (citing Wei,
6 763 F.2d 370, 372 (9th Cir. 1985)). Rather, it appears this
7 case slipped through the cracks until the Court issued its Order
8 to Show Cause (ECF No. 6), at which point Plaintiff discovered
9 the pendency of this action and resumed prosecution efforts.

10 In the absence of good cause, the Court may exercise its
11 discretion to dismiss the action without prejudice or extend the
12 period to effectuate service. Fed. R. Civ. P. 4(m); In re
13 Sheehan, 253 F.3d at 512. The Court finds that granting
14 Plaintiff an extension to effectuate service of process is not
15 in the interests of justice. Although Plaintiff may be severely
16 prejudiced, the remaining factors strongly favor dismissal.

III. ORDER

18 For the reasons set forth above, Plaintiff's complaint is
19 DISMISSED WITHOUT PREJUDICE against Defendant Action Motorsports
20 of Tahoe, Inc. (erroneously sued as Action Watersports of Tahoe)
21 pursuant to Rules 4(m) and 12(b)(5) of the Federal Rules of Civil
22 Procedure.

23 IT IS SO ORDERED.

24 || Dated: January 17, 2024


JOHN A. MENDEZ
SENIOR UNITED STATES DISTRICT JUDGE